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JAMES H. McKENNEY,
Clerk.

In the Supreme Court

Of the United States.

In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus.

CRANE & CO., TOPEKA.

14 Orig. O.J. 1904

In the Supreme Court

Of the United States.

In the Matter of the Application of Albert Heff, for a Writ of Habeas Corpus.

Petition.

Comes now your petitioner and represents to this Honorable Court that he is illegally restrained of his liberty at the county jail in the County of Shawnee and State of Kansas, by one W. H. Mackey, United States Marshal in and for the District of Kansas.

The cause of his said illegal restraint is a commitment issued by Frank L. Brown, Clerk of the United States District Court in and for the District of Kansas, upon a judgment rendered in the foresaid Court on the 15th day of October, A. D. 1904. Copies of said commitment and judgment are hereto attached, marked "Exhibit A" and "B," respectively, and made a part hereof.

Your petitioner further represents unto your Honorable Court that such illegal restraint consists in the following, to wit:

On the 11th day of April, A. D. 1904, the Grand Jury in and for this District found and presented an indictment against your petitioner, (a copy of said indictment is here-

to attached, marked "Exhibit C," and made a part hereof,) charging him with selling intoxicating liquor in the County of Brown, in the District of Kansas, First Division, to wit: two bottles of beer, to one John Butler, an Indian, a member of the Kickapoo Tribe of Indians, and a ward of the Government, and under the charge of O. C. Edwards, Agent and Superintendent of said Tribe of Indians.

Upon the trial it was shown that John Butler was an Indian to whom an allotment of land in severalty had been made by the Government under the provision of the Act of Congress of February 8th, 1887.

It was further shown that he had received his allotment as a member of the Kickapoo Tribe of Indians; that the allotment was within the Kickapoo Reservation in the State of Kansas; that he had received the first patent referred to in the Act of Congress of February 8th, 1887; that he was residing upon said allotment, and that there is an Agent and Superintendent who was appointed by the Government and who assumes and transacts the business of the Government with and for such alloted Indians.

It is claimed by your petitioner that the Act of Congress of January 30th, 1897 (29 Stat. 506), which declares it to be a crime punishable by a fine or imprisonment to sell spiritous or malt liquors to an Indian to whom an allotment of lands has been made while the title thereto is held in trust by the Government, is unconstitutional when the sale is made to an Indian who has received an allotment of land under the provisions of the Act of Congress of February 8th, 1887, because it is provided in said Act that each and every Indian to whom such allotments have been made shall be subject to the laws, both civil and criminal, of the State or Territory in which they may reside.

Your petitioner alleges that John Butler, having received an allotment of land in severalty and his patent

therefor under the provisions of the Act of Congress of February 8th, 1887, is no longer a ward of the Government, but a citizen of the United States and of the State of Kansas, and subject to the law, both civil and criminal, of said State.

The Hon. J. C. Pollock, Judge of the United States District Court in and for the State of Kansas, overruled this petitioner's contention upon the trial of said case, upon the decision of the Circuit Court of Appeals, Eighth Circuit, in the case of *Farrell vs. The United States,* 110 Fed. 942.

In view of said decisions, your petitioner makes his application direct to the Supreme Court of the United States.

WHEREFORE, Your petitioner prays that a Writ of Habeas Corpus may issue, and that he discharged without delay from such illegal imprisonment.

ALBERT HEFF, Petitioner.

UNITED STATES OF AMERICA, DISTRICT OF KANSAS.
State of Kansas, Shawnee County, ss.

I, Albert Heff, do solemnly swear that the facts and allegations set forth in the foregoing are true. So help me God. ALBERT HEFF.

Subscribed and sworn to before me, this 20th day of October, A. D. 1904.

[SEAL] F. L. CAMPBELL,
Deputy Clerk U. S. Dist. Court, District of Kansas, First Division.

EXHIBIT "A."

UNITED STATES OF AMERICA, DISTRICT OF KANSAS, ss.

At a term of the District Court of the United States of America for the District of Kansas, begun and held at the

City of Leavenworth, in said District, on Monday, the 10th day of October, 1904, proceedings were had, and appear of record, in words and figures following, to wit:

Saturday, Oct. 15th, 1904.

United States, No. 3735, vs. Albert Heff, indicted for selling whiskey to Indians.

It is thereupon now by the Court here considered, ordered and adjudged, that said defendant Albert Heff be imprisoned in the county jail of Shawnee County, Kansas, for a period of four (4) months, and that he make his fine unto the United States, in the sum of $200.00 and costs, and that he stand committed until said fine and costs are paid.

It is further ordered by the Court, that the Marshal deliver or cause to be delivered the body of said defendant unto the keeper of said jail within ten days from this date.

In testimony whereof, I hereunto set my hand and the seal of said court, at Topeka, in said district, this 15th day of October, A. D. 1904.

FRANK L. BROWN, Clerk.
By F. L. Campbell, Deputy.

(Seal of the District Court, U. S. District of Kansas.)

[Indorsed.]

No. 4909. Folio 277. Case No. 3735. United States *vs.* Albert Heff. Commitment. Returned and filed Oct. 17th, 1904.

FRANK L. BROWN, Clerk.
By F. L. Campbell, Deputy.

Fine, $200.00; costs, $37.24; total, $237.24.

MARSHAL'S RETURN.

Received this writ at Topeka, Kansas, October 15th, 1904, and executed the same October 15th, 1904, by committing the within named Albert Heff to the Shawnee

county jail, at Topeka, Kansas, taking the jailor's receipt therefor, as herein commanded.

W. H. MACKEY, JR., U. S. Marshal.
By F. W. Knapp, Deputy.

EXHIBIT "B."

Be it Remembered, That at a term of the District Court of the United States within and for the District of Kansas, First Division, begun and held at the City of Leavenworth, in said District, on Monday, the 10th day of October, A. D. 1904, the following proceedings were had, to wit:

Tuesday, Oct. 11, 1904.

The United States, No. 3735, vs. Albert Heff.—Selling whiskey to Indians.

Now comes as well the United States by John S. Dean, United States Attorney, as the said defendant Albert Heff in his own proper person and A. E. Crane and W. E. Archer, his attorneys, and thereupon the said defendant waives arraignment upon the indictment herein, and enters his plea of not guilty thereto; and to try matters submitted to them, come the following jury, to wit: Newell H. Smith, Eldridge Gray, P. R. Mitten, S. A. Cooper, A. P. Apassard, J. F. Naylor, Oscar O. Ayers, Obediah Williams, Frank Jolly, R. J. Wasser, A. D. Millirons and John D. Jacobs, twelve good and lawful men of the body of the First Division of the District of Kansas,—who, being duly sworn to well and truly try the matters submitted to them and a true verdict give according to the law and the evidence, the trial of said cause is proceeded with; and the jury having heard the evidence, arguments of counsel and instructions of the Court, retire in charge of their sworn bailiff to consider of their verdict, and afterwards come

into open court and through their foreman present the following verdict, to wit:

"*In the District Court of the United States for the District of Kansas. United States vs. Albert Heff, No. 3735.* —We, the jury in the above entitled cause, duly empaneled and sworn, upon our oaths, find the defendant Albert Heff guilty, as charged in the indictment.

P. R. MITTEN, Foreman."

Now comes the defendant Albert Heff, and through his counsel presents his motion for a new trial, which motion is, by the Court, set down for hearing on Saturday, Oct. 15th, 1904.

Saturday, Oct. 15, 1904.

The United States, No. 3735, vs. Albert Heff.—Selling whiskey to Indians.

This cause came on for hearing upon the defendant's motion for a new trial herein, the United States being present by John S. Dean, United States Attorney, and the defendant being present in person and by A. E. Crane and W. E. Archer, his attorneys, and the Court having heard the motion, arguments of counsel, and being duly advised in the premises, doth overrule said motion; to which ruling of the Court the defendant duly objects and excepts. Thereupon John S. Dean, United States Attorney, moves the Court for judgment and sentence against the above named defendant. Thereupon the Court asked the defendant if he had any good reason to offer why the sentence and judgment of the Court should not now be pronounced against him, and no good reason being offered,

It is thereupon now by the Court considered, ordered and adjudged, that the said defendant, Albert Heff, be imprisoned in the county jail of Shawnee County, Kansas, for a period of four (4) months, and that he pay a fine unto

the United States in the sum of two hundred ($200.00) dollars, and that he pay the costs of this prosecution; and that he further stand committed until said fine and costs are paid.

It is further ordered by the Court that the Marshal deliver or cause to be delivered the body of said defendant unto the keeper of said jail within ten days from this date.

EXHIBIT "C."

[Form No. 668.]

THE UNITED STATES OF AMERICA, DISTRICT OF KANSAS, ss.

In the District Court of the said United States, in and for the First Division of said District, April Term, 1904.

The United States of America vs. Albert Heff, (whose more full Christian name is unknown.) Indictment for violation of 29th Stat., pp. 506, Revised Statutes of the United States.

At the Term of the District Court of the United States of America, in and for the First Division of said District of Kansas, begun and held at Topeka, in the First Division of said District, on the 11th day of April, in the year of our Lord one thousand nine hundred and four, the Grand Jurors of the United States of America, duly impaneled, sworn, and charged to inquire of offenses committed within the First Division of the District of Kansas, upon their oaths do find and present, that Albert Heff, (whose more full Christian name is to the Grand Jurors aforesaid unknown,) late of the First Division of the District of Kansas aforesaid, on or about the 20th day of March, in the year of our Lord one thousand nine hundred and four, at the First Division of the District of Kansas aforesaid, and within the jurisdiction of this Court, did then

and there unlawfully sell, give away and dispose of certain malt, spiritous and vinous liquors, at the town of Horton, in the County of Brown, in the State and District of Kansas, to John Butler, to wit, two quarts of beer, more or less, and he, the said John Butler, being then and there an Indian, a member of the Kickapoo Tribe of Indians and a ward of the Government, under the charge of O. C. Edwards, an Indian Superintendent, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

EDWIN D. MCKEEVER,
Assistant United States Attorney.

[Indorsed.]

No. 3735. United States District Court, First Division. The United States vs. Albert Heff. Selling whiskey to Indians. A true bill.

A. A. WHEELER, *Foreman.*

WITNESSES: O. C. Edwards, Horton, Kansas. Dan Kah-Ke-Kah, Horton, Kansas. John Butler, Horton, Kansas.

Filed April 18, 1904.

FRANK L. BROWN, *Clerk.*

CERTIFICATE.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS, FIRST DIVISION.

UNITED STATES OF AMERICA, DISTRICT OF KANSAS, *ss.*

I, Frank L. Brown, Clerk of the District Court of the United States of America for the District of Kansas, do

hereby certify the foregoing to be a true, full and perfect copy of Indictment, Judgment and Sentence, and of the Commitment issued, with all endorsements thereon, in the case of The United States vs. Albert Heff, No. 3735, as the same appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, in said District of Kansas, this 20th day of October, A. D. 1904.

Frank L. Brown, Clerk.

[seal] By F. L. Campbell, Deputy Clerk.

In the Supreme Court of the United States.

BRIEF AND ARGUMENT.

I.

THE court has jurisdiction to grant a writ of habeas corpus, herein and should do so.

Ex Parte Mayfield, 141 U. S. 107.

II.

The petitioner was charged under the provision of the Act of Congress of January 30, 1897, (29 Stat. 506), with selling beer to John Butler, an Indian, a ward of the Government and under the charge of a Superintendent; and it was shown that John Butler was an Indian who had received an allotment of land in severalty under the Act of Congress of February 8th, 1887. It is not contended that the Government has no jurisdiction of a tribal Indian or the power to punish a person who sells such an Indian intoxicating liquor. This Honorable Court has defined the status of an Indian that is subject to the jurisdiction and

control of Congress. In the case of *The United States v. Hagama,* 118 U. S. 375, this court says:

"It seems to us that this is within the competency of Congress. These Indian tribes are the wards of the Nation. They are communities dependent upon the United States; dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the States, and received from them no protection."

III.

When an Indian has received an allotment of land in severalty and his patent therefor under the Act of Congress of February 8, 1887, he is a citizen of the United States and the State in which he resides, and is subject to its laws, both civil and criminal.

In re Now-ge-zhuck, 76 Pac. 877.
State v. Denoyer, 72 N. W. 1014.
State v. Norris, 55 N. W. 1086.
Keokuk v. Ulam, 38 Pac. 1080.
Wa-la-note-tke-tynin v. Carter, 53 Pac. 1006.
U. S. v. Rickert, 106 Fed. 1.

IV.

If an Indian to whom an allotment of land in severalty has been made under the provisions of the Act of Congress of February 8th, 1887, is a citizen of the United States and the State in which he resides and is subject to the laws of such State, then the Government cannot legislate concerning him. The State and the Government cannot

legislate upon the same subject. There is no such thing as a divided jurisdiction. In the case of *The U. S. v. Ward,* 1 Kans. 601, it is said:

"It would seem that the right to enforce her criminal laws, in any part of the soil which became a part of the State of Kansas by that Act, is a necessary incident to her becoming one of the States of the Union on an equal footing in all respects with the other. This right is exclusive; it is not a right to be exercised jointly or concurrently with the Federal Government. It needs no argument to prove that if this right, in any given locality, rests with the State of Kansas, it cannot belong to the Federal Government."

In the case of *The State v. Campbell,* 55 N. W. 553, 555, it is said, in speaking of the Indians, to wit:

"And if they are thus under the control of Congress, that control must be exclusive, for, as suggested in the case of *The Kansas Indians,* 5 Wallace, 737, 'from necessity there can be no divided authority.' It would never do to have both the United States and the State legislating on the same subject."

It is plain from the foregoing authorities that if the State of Kansas has jurisdiction of the person of the Indians, and can legislate concerning them, that jurisdiction must be exclusive.

ALBERT HEFF.